Zulkri bin Yakub v Timbalan Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–219–12 OF 2012
AMELIA TEE ABDULLAH J
15 MARCH 2012

Preventive Detention — Detention — Application for habeas corpus — Whether r 5 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 breached — Detainee's counsel not present at representation hearing before advisory board — Whether breach rendered continued detention unlawful — Whether manner detainee's statement recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 constituted part of investigations and had no direct link to validity of detention order

The applicant applied for a writ of habeas corpus on the ground his detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') was unlawful. Following his arrest by police under s 3(1) of the Act and after considering the relevant reports submitted to him under s 3(3) and 5(4) of the Act the first respondent issued a two year detention order against the appellant. Pursuant to the appellant's motion the advisory board ('the board') under the Act heard his representation and forwarded its recommendations to the King who concurred with the issuance of the detention order. In his instant application, the applicant contended, inter alia, that s 4 of the Act and r 5 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 had been breached rendering his detention unlawful. With regard to s 4 the applicant alleged that the investigating officer concerned failed to carry out any investigations into his case; that he in fact had never met the officer; and that the mandatory procedures under s 4 concerning the manner in which the statement from him was to be recorded was not followed. Concerning r 5, the applicant contended that while he was informed that his representation hearing would take place at 11am on 19 December 2012 — as confirmed in the copy of the Form II served on him by the board — yet, on that day the hearing commenced at 9am without the presence of his counsel, and was held again at 11am when his counsel was present.

Held, granting the writ and ordering the applicant to be released forthwith:

(1) A hearing of the board held without the presence of the applicant's counsel and at a time which was different from that stated in the Borang II was a breach of the mandatory provisions of r 5 which rendered the applicant's continued detention unlawful (see paras 38–39).

(2) The affidavits before the court revealed contradictory evidence as to whether there were one or two hearings on 19 December 2012. Whilst the secretary of the board said the hearing was held at 9am, the Form II gave the time of the hearing as 11am. The applicant's counsel was only present at the 11am hearing. The inference more favourable to the applicant i.e. that there was a first hearing at 9am where the applicant was not represented by his counsel could be drawn and accepted by the court (see para 38).

(3) The court found there was no basis for the applicant's complaint that s 4 of the Act had been breached. The manner in which the applicant's statement was recorded, which constituted part of the investigations into the case, was not a condition precedent, nor did it have a direct link, with the detention order made by the first respondent (see para 18).

[Bahasa Malaysia summary

Pemohon memohon untuk writ habeas corpus atas alasan penahanannya di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta') adalah salah di sisi undang-undang. Berikutan penangkapannya oleh polis di bawah s 3(1) Akta dan selepas mempertimbangkan laporan-laporan relevan yang dikemukakan kepadanya di bawah s 3(3) dan 5(4) Akta responden pertama mengeluarkan perintah tahanan selama dua tahun terhadap perayu. Berikutan usul perayu lembaga penasihat ('lembaga') di bawah Akta mendengar representasinya dan mengajukan cadangan-cadangannya kepada Agung yang bersetuju dengan pengeluaran perintah tahanan. Dalam permohonannya ini pemohon berhujah, antara lain, bahawa s 4 Akta dan kaedah 5 Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987 telah dilanggar menyebabkan penahanannya salah di sisi undang-undang. Berkaitan s 4 pemohon mendakwa bahawa pegawai penyiasat yang berkenaan gagal untuk menjalankan apa-apa siasatan ke dalam kesnya; bahawa dia sebenarnya tidak pernah berjumpa pegawai tersebut; dan bahawa prosedur mandatori di bawah s 4 adalah berkaitan cara bagaimana penyataan daripadanya direkodkan tidak diikuti. Berkaitan kaedah 5, pemohon berhujah bahawa sementara dia diberitahu yang pendengaran representasinya akan didengar pada 11 pagi 19 Disember 2012 — seperti yang disahkan di dalam salinan Borang II yang diserahkan ke atasnya oleh lembaga — tetapi, pada hari tersebut pendengaran bermula pada 9 pagi tanpa kehadiran peguamnya, dan dijalankan sekali lagi pada 11 pagi apabila peguamnya hadir.

Diputuskan, membenarkan writ dan memerintahkan pemohon dilepaskan serta merta:

(1) Pendengaran lembaga dijalankan tanpa kehadiran peguam pemohon dan pada masa yang berbeza daripada yang dinyatakan di dalam Borang II

adalah pelanggaran peruntukan kaedah 5 yang menyebabkan penahanan berterusan pemohon salah di di sisi undang-undang (lihat perenggan 38–39).

(2) Afidavit di hadapan mahkamah menunjukkan keterangan bertentangan terhadap sama ada terdapat satu atau dua pendengaran pada 19 Disember 2012. Sementara setiausaha lembaga menyatakan pendengaran dijalankan pada 9 pagi, Borang II memberikan masa pendengaran sebagai 11 pagi. Peguam pemohon hanya hadir pada pendengaran 11 pagi. Inferens lebih memihak kepada pemohon iaitu bahawa terdapat pendengaran pertama pada pukul 9 pagi di mana pemohon tidak diwakili oleh peguamnya boleh diambil kira dan diterima oleh mahkamah (lihat perenggan 38).

(3) Mahkamah mendapati tidak terdapat asas untuk aduan pemohon bahawa s 4 Akta telah dilanggar. Cara di mana penyataan pemohon direkodkan, yang membentuk bahagian siasatan ke dalam kes, bukan pra syarat, juga ia mempunyai hubungan terus, dengan perintah tahanan yang dibuat oleh responden pertama (lihat perenggan 18).]

Notes

For cases on application for habeas corpus, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1414–1415.

Cases referred to

L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia [2010] 7 CLJ 653, FC (folld)

Koh Yoke Koon v Minister of Home Affairs, Malaysia & Anor [1988] 1 MLJ 45; [1987] 1 LNS 67 (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (folld)

Parasuraman a/l Velu v Ketua Polis Negara, Malaysia & Ors [2006] 5 MLJ 764, HC (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 3(1), 3(2), (2)(a), (c), (d), (3), 4, 4(2), (3), (4), (5), 5(4), 6(1), 9, 10(1)

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 r 5

N Sivananthan (Tina Ong with him) (Sivananthan) for the applicant.

Zafran Zafri b Mohd Zaini (Federal Counsel, Ministry of Home Affairs, Malaysia) for the respondents.

Amelia Tee Abdullah J:

[1] Vide a notice of motion dated 27 December 2012, the applicant, Zulkri bin Yakub, has applied for a writ of habeas corpus on the grounds that his detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 is unlawful.

[2] The applicant was arrested by the police on 26 August 2012 at 2.50am at an unnumbered house in Kampung Bukit Tok Ali, Kuala Balah, Jeli, Kelantan under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and detained until 8 September 2012 under s 3(2)(c) and 3(2)(d) of the Act for purposes of investigation. On 7 September 2012, the first respondent, the Deputy Minister of Home Affairs, received a report pertaining to the circumstances of the arrest and detention of the applicant from Senior Assistant Commissioner Jamaludin bin Kudin. Subsequently, on 24 September 2012, the first respondent received a report of the investigation submitted by Inspector Jamri bin Ahmad under s 3(3) of the Actand on 9 October 2012 a report from the inquiry officer Intan Noorashikin bt Nasarudin under s 5(4) of the Act.

[3] After considering the reports submitted under ss 3(3) and 5(4) of the Act, the first respondent issued a detention order dated 24 October 2012 under s 6(1) of the Act directing the applicant to be detained at Pusat Pemulihan Akhlak, Machang, Kelantan for a period of two years.

[4] On 30 October 2012, the advisory board ('the board') received the applicant's representation dated 24 October 2012 (Form I). On 2 November 2012, the board issued a notice of hearing of representation (Form II) notifying that the board would be sitting on 20 November 2012 at 9am to hear the applicant's representation. Form II was served on the applicant on 6 November 2012 by Murali a/l Arumugon. The hearing on 20 November 2012 was adjourned as Messrs Sivanathan, the solicitors representing the applicant had sent a letter requesting the board to adjourn the hearing to 4 December 2012 as counsel was representing another detainee for a different representation hearing. The board had informed the applicant verbally that the new date for hearing of his representation would be 4 December 2012 at 9am at Pusat Pemulihan Akhlak, Machang, Kelantan. On the same day, a fresh Form II dated 20 November 2012 was issued and served on the applicant by Murali a/l Arumugon to inform him that the next hearing date would be on 4 December 2012.

[5] On 4 December 2012, the representation hearing was adjourned at the request of the applicant's counsel because the investigating officer of the case,

who was the applicant's witness, was absent. The board had informed the applicant verbally that the new date for hearing of his representation would be 19 December 2012 at 11am at Pusat Pemulihan Akhlak, Machang, Kelantan. On the same day, a fresh Form II dated 4 December 2012 was issued and served on the applicant by Murali a/l Arumugon to inform him that the next hearing date would be on 19 December 2012 at 11am at Pusat Pemulihan Akhlak, Machang.

[6] The applicant's representation was heard by the board on 19 December 2012 in the presence of his counsel, Dato' Sivananthan from Messrs Sivananthan. At the request of the applicant for the services of an interpreter, the board had directed L/Kpl Lim Siang Wei to act as the interpreter for the applicant for the duration of the hearing.

[7] The board, after considering the representations of the applicant, had on 26 December 2012 forwarded its recommendations to the Yang di-Pertuan Agong pursuant to s 10(1) of the Act. And after considering the recommendations of the board, His Majesty the Yang di-Pertuan Agong had agreed with the detention order made by the first respondent under s 6(1) of the Act.

[8] In his submissions before the court, the applicant has raised three main issues. The court will deal with each in turn.

NON-COMPLIANCE WITH S 4 OF THE DANGEROUS DRUGS (SPECIAL PREVENTIVE MEASURES) ACT 1985

[9] The first issue that is raised by the applicant is the alleged non-compliance with s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). In paras 9–10 and 37(h) of his affidavit in support, the applicant had made the following complaints:

(a) the investigating officer handling the applicant's file did not carry out any investigations at all and, in fact, the applicant had never met with him. The applicant's statement was recorded by a police officer who was not the investigating officer. When the applicant attempted to explain the actual position to him, the said police officer had refused to hear any explanation but had merely asked the applicant to admit to involvement in the various allegations against him (para 9);

(b) the recording of the applicant's statement was not made in accordance with law but were untrue and not made by him. He was also forced to sign the statement without being afforded an opportunity to either read or amend the said statement (para 10); and

(c) there was contravention of s 4 of the Act when the investigating officer failed to carry out any investigations into the applicant's case and failed to follow the mandatory procedures under that section (para 37(h)).

[10] Section 4 of the Act reads as follows:

> (1) For the purpose of satisfying the Minister that an order under subsection (1) of section 6 should be made and for the purpose of enabling the Minister to furnish a statement under paragraph (b) of subsection (2) of section 9, a police officer making an investigation under this Act may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
>
> (2) Such person *shall be bound to answer all questions* relating to such case put to him by such officer.
>
> (3) A person making a statement under this section *shall be legally bound to state the truth*, whether or not such statement is made wholly, or partly in answer to questions.
>
> (4) A police officer examining a person under subsection (1) *shall first inform* that person of the provisions of subsections (2) and (3).

[11] Learned counsel for the applicant submits that the word 'shall' used in s 4(4) of the Act denotes a mandatory prerequisite which must be adhered to before a statement can be taken from the applicant. As such, he contends that before any questions can be posed to the applicant, it is mandatory for the officer in charge to first inform the applicant of the cautions under sub-ss (2)–(3).

[12] The court has carefully examined the averments of the deponents in relation to this issue. In this regard, the court notes as follows:

(a) Insp Jamri bin Ahmad had affirmed in his affidavit in reply (encl 13) that he is the investigating officer in charge of investigating the applicant's case (para 4), and that he had requested the assistance of Insp Oon Kim Cheng to record the applicant's statement (para 5). Insp Oon had recorded the applicant's statement and forwarded it to Insp Jamri for his further action (para 6);

(b) in his affidavit in reply (encl 14), Insp Oon Kim Cheng, a senior police officer, had confirmed that he was requested by Insp Jamri to record the statement of the applicant (para 4), which he did on 5 September 2012. He had ascertained that the applicant understood *Bahasa Malaysia* and he had communicated with the applicant in *Bahasa Malaysia* throughout the recording of the statement. He was also assisted by L/Kpl Md

Kamarozaman bin Kamsan who acted as an interpreter. In para 6 of his affidavit, Insp Oon had averred as follows:

> Sebelum rakaman percakapan diadakan, saya telah menerangkan kepada Pemohon dalam bahasa Malaysia dan diterangkan kembali dalam bahasa Malaysia oleh L/KPL MD KAMAROZAMAN B. KAMSAN tujuan rakaman percakapan diambil adalah untuk siasatan. Oleh itu Pemohon perlu menjawab semua soalan yang dikemukakan dan perlu menyatakan yang benar.

(c) L/Kpl Md Kamarozaman bin Kamsan had confirmed in para 8 of his affidavit in reply (encl 15) that Insp Oon had explained to the applicant 'tujuan rakaman percakapan diambil adalah untuk siasatan. Oleh itu Pemohon perlu menjawab semua soalan yang dikemukakan dan perlu menyatakan yang benar'.

[13] Thus the applicant's complaint in respect of this issue is twofold, namely:

(a) whether the words said were sufficient or vague ('samar-samar'); and

(b) Whether the words alleged to have been said were said at all.

[14] Learned federal counsel has submitted that the procedure as set out in s 4(5) of the Act had been complied with. The date and time of taking the statement of the applicant by Insp Oon had been recorded in the statement of the applicant. Unfortunately, the statement could not be produced as it is against the national interests to so produce or disclose. Further, from the affidavits of Insp Oon and L/Kpl Md Kamarozaman, it was clear that the applicant was informed of the provisions of s 4(2)–4(3).

[15] The court has duly considered the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 submitted by learned federal counsel for the respondents. In that case, the appellant had filed a writ of habeas corpus to secure his release claiming that the irregularities in his arrest and detention under s 3(2) had vitiated the order of detention issued by the Minister under s 6(1). The High Court had dismissed his application for a writ of habeas corpus and the appellant appealed. In that case, the dominant issue for determination was the extent to which a valid detention order made against a person under s 6(1) can be vitiated by irregularities in his arrest and detention under s 3.

[16] The Federal Court, in dismissing the appellant's appeal, found that notwithstanding the fact that there were procedural irregularities in the detention of the appellant, however, *it is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent*

detention order that a person can make a valid complaint of the detention. The precondition to the exercise of jurisdiction under s 6(1) is, inter alia, a consideration of the report of investigation. There is no stipulation that it must be the result of a valid detention. The report of investigation has no direct link with the detention and can be considered by the Minister even if it contains a statement by the person whose detention under s 3(1) is irregular. The legality of the detention of a person under s 3(2) is not a condition precedent to the making of a detention order against him under s 6(1). As was held by Augustine Paul FCJ:

> Generally a writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular. It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed against that order even if the earlier arrest and detention are irregular. Thus any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. A prior illegality which has ceased cannot be the subject matter of inquiry.

[17] In the more recent case of *L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia* [2010] 7 CLJ 653, the Federal Court declined to depart from the decision in *Mohd Faizal bin Haris*. As stated by Abdull Hamid Embong FCJ, delivering the judgment of the Federal Court:

> The scheme under the Act (similarly under the Emergency (Public Order and Prevention of Crime) Ordinance 1969) is that, before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner of conducting the investigations and arrest at this stage is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review.

[18] Thus applying these two decisions of the Federal Court to the facts of our instant case, the court agrees with learned federal counsel that the manner in which the statement of the applicant was recorded which constitutes part of the investigations into this case is not a condition precedent nor had it a direct link with the order of detention that was made by the Deputy Minister in this case. The court finds that those authorities cited by learned counsel for the applicant, insofar as they referred to and relied on the case of *Koh Yoke Koon v Minister of Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45; [1987] 1 LNS 67, which decision had been held by the Federal Court in *L Rajanderan R Letchumanan* as no longer good law, would no longer be applicable. As such, the court finds no basis in respect of this ground for the application.

NON-COMPLIANCE WITH S 3(2) OF THE DANGEROUS DRUGS (SPECIAL PREVENTIVE MEASURES) ACT 1985

[19] The next issue relates to an alleged non-compliance with s 3(2)(c) of the Act. Section 3(2) of the Act reads, inter alia, as follows:

A (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of section 6.

B **[20]** In para 10 of his affidavit, SAC Jamaludin bin Kudin states that the applicant was arrested under the Act on 26 August 2012. This is consistent with his report to the Minister under s 3(2)(c) of the Act which states that the applicant was arrested on 26 August 2012 at 2.50am by the police. The applicant was then detained under s 3(2)(a) and 3(2)(b) of the Act until C 8 September 2012 for purposes of investigations.

[21] And when was the order of detention issued and served on the applicant? In para 4 of her affidavit affirmed on 17 January 2013, Munira bt Mohammad Yasser Yoga, an assistant secretary in the Kementerian Dalam D Negeri, has averred that she was directed by the Deputy Minister to prepare the order of detention under s 6(1) of the Act as well as the allegation of facts. She did so and the order was duly forwarded to the Deputy Minister. The Deputy Minister had examined the documents and, and upon his being satisfied that E all the documents had been prepared according to his wishes and directions, had signed the order of detention and affixed thereon the date of signing the order. In his affidavit affirmed on 17 January 2013 the Deputy Minister had confirmed the issue of an order of detention by him on 24 September 2012.

F **[22]** And when was the detention order served on the applicant? With reference to para 10 of the affidavit of Insp Jamri bin Ahmad affirmed on 17 January 2013, the order of detention and the allegation of facts were served by him on the applicant on 24 October 2012 at 11pm.

G **[23]** The applicant contends that the issuance of the detention order after 2.50am on 24 October 2012 violates s 3(2) of the Act. He contends that the detention order must be issued before the expiration of the 60th day and, in this case, it should have been issued before 2.50am on 24 October 2012.

H **[24]** Although the applicant had abandoned this issue on the morning of the hearing, however, the court will nevertheless state for the record that there is no merit as regards this issue. From a calculation of the dates of his detention, the court is satisfied that from the date of the applicant's arrest on 26 August I 2012–24 October 2012 is only 59 days. When calculating the number of days of detention, care must be taken not to count 26 August 2012 as it is only on 27 August 2012 that the applicant would have been detained for the first day. In the circumstances, the court finds that there was no non-compliance with the provisions of s 3(2) of the Act.

NON-COMPLIANCE WITH S 9 OF THE ACT AND R 5 OF THE DANGEROUS DRUGS (SPECIAL PREVENTIVE MEASURES) (ADVISORY BOARD PROCEDURE) RULES 1987

[25] The applicant has also raised an issue about an alleged non-compliance with s 9 of the Act and r 5 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. Section 9 of the Act provides for the right of a detained person to make representations to the advisory board. Rule 5 of the Rules gives the detained person a right to be represented by his advocate at the hearing before the board.

[26] In para 32 of the affidavit in support of his application, the applicant has averred that he was not informed of the hearing of his representation on 19 December 2012 and that he 'hanya mengetahui berkenaan pendengaran Representasi saya tersebut pada tarikh 19.12.2012 berkenaan'. As such, the court understands that the applicant's complaint in this paragraph is that he was not informed that the date of the hearing of his representation was 19 December 2012 until that very day itself. The court notes that in his lengthy affidavit comprising some 37 paragraphs in 17 pages, para 32 is the only paragraph which refers directly to the representation hearing on 19 December 2012.

[27] Is the applicant's contention borne out by the facts? As stated in the affidavit of Zaitun bt Mohd Salleh (encl 7), after a number of adjournments at the request of the applicant's counsel, the board had adjourned the representation hearing to 19 December 2012. The court notes the various averments of Zaitun bt Mohd Salleh in respect of the hearing on 19 December 2012:

(a) the board had 'memaklumkan secara lisan kepada Pemohon tarikh baru persidangan representasi adalah pada 19-12-2012 *jam 11.00 pagi* di PPA Machang, Kelantan' (para 8); (Emphasis added.)

(b) the board had issued *Borang* II dated 4 December 2012 and handed it to the PPA Machang, Kelantan to be served on the applicant. Various copies of *Borang* II were exhibited in Zaitun's affidavit. The representation was scheduled for 19 December 2012 at 11am (para 9);

(c) the applicant's representation was heard before the board in the presence of the applicant on 19 December 2012 at 9am in PPA, Machang, Kelantan (para 11);

(d) the board had asked the applicant whether he was represented by counsel in light of the fact that at the previous hearing, he was represented by counsel. The applicant had informed that he was represented by Dato' Sivananthan from Messrs Sivananthan (para 13); and

(e) the board had sat for a day. The applicant was present and was represented by his counsel, Dato' Sivanathan from Messrs Sivananthan (para 15).

[28] Murali a/l Arumugon had averred in his affidavit (encl 11) that on 4 December 2012; he had served on the applicant a copy of *Borang* II. He had read and explained the contents of the *Borang* II to the applicant in *Bahasa Malaysia* to the effect that the board would be sitting on 19 December 2012 at 11am at PPA Machang, Kelantan to hear his representation. He had also explained to the applicant his right to make representations to the board, and that he could appear by himself or be represented by counsel at the hearing. The applicant had acknowledged receipt of the *Borang* II and had affixed his signature on the said *borang*. This *Borang* II can be seen in 'ZM2' attached to the affidavit of Zaitun (encl 7) where the signatures of both the detained person and Murali, as the person serving the *borang*, can be seen. The court notes that the applicant has not filed any affidavit to deny that his signature appears on the said *Borang* II.

[29] In light of the above, the court finds that there is absolutely no basis in the applicant's contention in para 32 of his affidavit that he was not informed of the date of the hearing of his representation until that very day itself.

[30] However, before me, learned counsel for the applicant had raised an issue that it was not stated in Zaitun's affidavit whether the applicant's counsel was also present during the hearing at 9am. It was submitted that there would appear to have been two hearings on 19 December 2012, namely one at 9am where the applicant's counsel was not present, and the other at 11am when Dato' Sivananthan was present. As such, counsel submits that there were uncertainties as to whether the board had also taken into consideration the applicant's representation at the hearing at 9am; whether it had only taken into consideration the representation at the hearing held at 11am; or whether it had taken the representations at both hearings as a whole.

[31] The applicant's representative was not present at the hearing at 9am. In para 13 of Zaitun's affidavit, it was averred that the applicant was asked if he was represented by counsel. There would have been no need for such a question if his representative was present at 9am. If confirmation is needed, the court was informed by Dato' Sivananthan from the Bar table that he was only present at 11 for the hearing.

[32] In light of these facts, learned counsel for the applicant has submitted that the applicant was deprived of his right to legal representation during the hearing on 19 December 2012 at 9am. And that this would render the recommendation made by the board to the Yang di-Pertuan Agong to be defective.

[33] Learned federal counsel's attempt to resolve the discrepancy in the averments of Zaitun was merely by submitting that 'Walaupun pada perenggan 9 telah menyatakan bahawa Lembaga Penasihat akan bersidang pada pukul 11 namun pada 19.12.2012 Lembaga Penasihat telah pun mendengar representasi pemohon *pada jam 9.00 pagi*'. From this it would appear that federal counsel was in fact conceding that although the board was to hear the representation at 11am, it had actually heard the representations of the applicant at 9am.

[34] In relation to this issue, the court finds that the question that arises is not whether there was a hearing at 11am where both the applicant and his representative were present and the representations of the applicant were duly heard by the board. Rather, the issue is whether there was an earlier hearing at 9am that same day where the applicant was present, but without his counsel. The court finds that the averments of Zaitun bt Mohd Salleh, the secretary to the board would support the applicant's contention that there appears to have been two hearings. The *notis pendengaran representasi* in *Borang* II clearly states that the hearing would be held on 19 December 2012 at 11am. In para 8 of her affidavit, Zaitun had also averred that on 4 December 2012, the applicant was informed that the next date for the hearing of the representation would be 19 December 2012 at 11am. That being so, the court finds that the applicant's counsel's statement, albeit from the Bar table, that he was present at 11am for the representation hearing, can be accepted without hesitation.

[35] If that is the position, what of the hearing that was held at 9am? According to Zaitun, the hearing took place at 9 in the presence of the applicant. The board had enquired from the applicant as to whether he was represented. Such a question would point to the absence of the applicant's counsel. The court accepts that the applicant's counsel was not present at 9am. The following questions now arise. Did the hearing proceed at 9am? What happened at 9am? What facts, if any, did the board ascertain at this hearing at 9am which was held in the absence of the applicant's representative?

[36] The court finds these questions to be incapable of being answered from the affidavits that are filed in this case. In the case of *SK Tangakaliswaran Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705, the Federal Court had held as follows:

> … It is for the respondents to prove that the constitutional and statutory safeguards embodied in art 151 and s 6(1) were strictly complied with.
>
> … Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently,

where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn.

[37] In the case of *Parasuraman a/l Velu v Ketua Polis Negara, Malaysia & Ors* [2006] 5 MLJ 764, the High Court had held that 'The right given to a detainee to be represented by a legal counsel is a real and substantive right guaranteed under the Constitution, Ordinance and the Rules made under the Ordinance and must be strictly adhered to'.

[38] In this case, the affidavits before the court reveal contradictory evidence as to whether there were one or two hearings on 19 December 2012. According to the secretary of the board, the hearing was held at 9am. However, the relevant *Borang* II gives the time of the hearing as 11am. The applicant's representative was only present at the hearing at 11am. As such, and in reliance on the authority of *SK Tangakaliswaran Krishnan*, the inference more favourable to the applicant the effect that there was a first hearing before the board at 9am on 19 December 2012 where the applicant was not represented by his counsel can be drawn and accepted by the court. A board hearing held without the applicant's counsel and at a time which was different from that stated in the *Borang* II would clearly be in breach of r 5.

CONCLUSION

[39] In conclusion, the court finds that although there were no merits in the first two issues, however there has been a breach of the mandatory requirement of r 5 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. The court finds that this serious procedural non-compliance constitutes a breach of the mandatory requirement of r 5(1) of the Rules which would render the applicant's continued detention to be unlawful. As such, the applicant's application for a writ of habeas corpus is granted and the applicant is to be set at liberty forthwith.

Writ granted and applicant ordered to be released forthwith.

Reported by Ashok Kumar